

SUBMISSION

to the

ATTORNEY-GENERAL'S DEPARTMENT

regarding the

CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006
EIGHT-YEAR REVIEW

from

THE PRESBYTERIAN CHURCH OF VICTORIA

CHURCH AND NATION COMMITTEE

JUNE 4, 2015

Introduction

The Presbyterian Church of Victoria welcomes the opportunity to once again review the *Charter of Rights and Responsibilities Act 2006*. The balancing of rights and responsibilities is an important part of a fair, democratic society. Living in community with others requires give and take – it is about balancing needs, desires and aspirations; having freedom to make choices individually and collectively while pursuing the common good. To do this, we need to carefully think about the outcome of any human rights program; importantly, does it protect those who need protection while still allowing freedom to flourish?

The Presbyterian Church of Victoria (PCV) believes that human rights are ultimately derived from God. Therefore, states do not establish human rights; rather, they recognize them. Established, recognized laws should enshrine universal human rights, and these are best upheld by a state with both limited powers and the ability to execute the rule of law.

Our response to the review and our recommendations are contained below.

Human Rights Culture

The proponents of the *Charter of Rights and Responsibilities 2006* wish to create a 'human rights culture' within Victoria. While we agree that the upholding of human rights is an important part of good society, we also would not wish to see a 'litigation' culture where the aggressive assertion of individual rights is a predominant feature.

That being said, we do believe that there are fundamental human rights that require some protection, dealing with citizen against citizen, state against citizen and citizen against state. While we do not see that a charter is rights is necessary, it is heartening to see that the Charter does not seem to overreach its stated aims to protect human rights in such a way that 'respects the rule of law, human dignity, equality and freedom.'

The list of rights contained in the Charter seem proportionate. We do not see the need for the inclusion of any further rights, except that the right to freedom of conscience be further elaborated as per our recommendation.

Recommendation: The PCV sees no reason to add any further rights to those listed in the current charter.

Understanding Equality and Freedom

'Equality' and 'freedom' are often grouped together as overarching principles in human rights documents. However, a proper understanding of their relationship to each other is vital when trying to incorporate them together. It should be noted that, while they sound ideologically 'companionable', equality and freedom are often in competition with each other; in a practical sense, one tends to borrow from the other to pursue its gains.

For example, a Christian school will want to maintain their freedom to hire a teacher that upholds, and shares their Christian beliefs, and ethos. Others concerned with equality may argue there should be nothing more than an inherent requirement test for any employment, including in a Christian school.

Consequently, if equality is held alone, and is privileged above all other principles, it will undoubtedly diminish freedom. It is vital to note that both freedom and equality require a measure of discrimination to achieve their aims; that is, that freedom to choose diminishes with equality, and equality diminishes as freedom of choice abounds. Therefore, ensuring that there is balance between the two is of special importance. Human rights charters, by their nature, tend to privilege equality over freedom. Therefore, extra care must be taken to ensure that freedom is not unduly encroached.

Conscience

The importance of being able to act in accordance with one's conscience is a vital role in a democratic society. A society that routinely enforces its citizens to act in ways that go against their fundamental beliefs is a society moving toward a totalitarian state. The PCV would not like to see this occur. Victorian laws have sometimes encroached on conscience, such as the mandate for doctors with a conscientious objection to abortion to refer on a patient to receive that service.

In the case of *Eweida and others v. the United Kingdom*¹, in the European Court of Human Rights, Justices Vučinić and De Gaetano give specific advice on the issue of conscience when interpreting rights. The first principle is that, 'no one should be forced to act against one's conscience or be penalised for refusing to act against one's conscience.' They further elaborated on the definition of conscience:

Conscience – by which is meant moral conscience – is what enjoins a person at the appropriate moment to do good and to avoid evil. In essence it is a judgment of reason whereby a physical person recognises the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed.

They also distinguish between freedom of religion and freedom of conscience as fundamentally different entities, and that both those who consider themselves 'religious' and those who think otherwise exercise their conscience on a day-to-day basis:

This rational judgment on what is good and what is evil, although it may be nurtured by religious beliefs, is not necessarily so, and people with no particular religious beliefs or affiliations make such judgments constantly in their daily lives.

They caution against the hindrance of conscience when it is clear that a conscientious objection is concerned:

We are of the view that once that a genuine and serious case of conscientious objection is established, the State is obliged to respect the individual's freedom of conscience both positively (by taking reasonable and appropriate measures to protect the rights of the conscientious objector²) and negatively (by refraining from actions which punish the objector or discriminate against him or her).

¹ <[www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":\["001-115881"\]}](http://www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{)>

Those reviewing the Charter need to be aware that human rights documents have not prevented the trampling of the free exercise of conscience.

While the Charter includes the right to 'freedom of thought, conscience, religion and belief,' it does not elaborate on the role and protection of the conscience. Accordingly, we recommend that this should be enunciated as per the suggestion below.

Recommendation:

Under the list of human rights, point 14, 'Freedom of thought, conscience and belief', should include the following additions:

- 1. (3) (c) the freedom to act in accordance with one's conscience, whether abstaining from or actively pursuing an activity, in private or in public.***
- 2. (2) (b) a person must not be coerced in ways that go against their conscience.***

Balancing rights

We are concerned that the recent tendency in many jurisdictions with the interpretation of human rights instruments is to privilege certain rights at the expense of others. Where there is a conflict, often between the rights of equality and non-discrimination versus the right to freedom of religion and conscience, the former rights are typically seen as more important than the latter. However, as we have argued, rights documents need to acknowledge that freedom and equality are often competing principles; like bookends, they are both important, but they need to be kept in balance with each other for societal stability.

The Charter does not inherently deal with how rights will be balanced against each other where there is a conflict. It is unclear, then, what would happen if and when this may occur.

The Charter only outlines that rights need to be considered when enacting legislation, as per section 32. Therefore, should there be a clash of rights, the court should not and cannot apply section 32, since the Charter itself contains no criteria by which the court can evaluate whether one right is more important than another. Instead, the courts should simply revert to standard principles of statutory construction. This would respect the balance that has been struck by Parliament.

To decide which right should be privileged is essentially a policy or political decision, not one for the courts to make. It is for the legislature to strike such balances, and where rights conflict, the legislation has already struck a balance. The courts ought to respect that balance.

In addition, when balancing rights, the interpretation which amounts to the least interference by the state should be favoured.

Recommendation:

As such, the PCV recommends that under Section 32 the following wording under (1):

- (2) Where two or more rights are in direct conflict with each other, the courts should assume standard principles of statutory construction.***

The Right to Life

Right (9) in the Charter's list of rights names 'The right to life', stating that, 'Every person has the right to life and has the right not to be arbitrarily deprived of life.'

However, later in the document, in section 48, the Charter states that, 'Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.'

This is clearly a contradiction within the Charter.

The quality of life of the unborn and of the aged is a true litmus test of the state of humanity in our society. If we, as a society, are willing to take the life of the unborn or the frail and aged, then we do not fully understand the inherent dignity of the human person.

Victoria's contentious abortion laws, for example, operate in direction contravention to that right, by depriving an unborn human person of their life.

If the Charter is fully protective of all human persons, Victoria's abortion laws should be retrospectively and comprehensively dismantled.

It grieves the PCV that the Charter goes so far in trying to protect the human person, but has so far failed to protect unborn human life.

Recommendation:

The PCV recommends that Section 48 should be completely removed from the Charter.

In summary, the Presbyterian Church of Victoria makes the following recommendations:

- *The PCV sees no reason to add any further rights to those listed in the current charter.*
- *Under the list of human rights, point 14, 'Freedom of thought, conscience and belief', should include the following additions:*
 - (3) (c) the freedom to act in accordance with one's conscience, whether abstaining from or actively pursuing an activity, in private or in public.*
 - (2) (b) a person must not be coerced in ways that go against their conscience.*
- *The PCV recommends that under Section 32 the following wording under (1):*
 - (2) Where two or more rights are in direct conflict with each other, the courts should assume standard principles of statutory construction.*
- *The PCV recommends that Section 48 should be completely removed from the Charter.*

Darren Middleton

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